IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OMAR POLANCO	:	**CIVIL ACTION**
	:	**No. 98-5808**
v.	:	
	:	
UNITED STATES	:	**(Criminal No. 92-256-1)**

MEMORANDUM ORDER

Petitioner is serving a sentence of 188 months of imprisonment imposed following his plea of guilty to distributing and conspiring to distribute crack cocaine. He has filed an array of motions and petitions, some of which were withdrawn or amended. Some complementary and parallel pleadings were assigned different civil action numbers. Tracing the claims and retrieving information pertinent to them has not been altogether facile. Although variously styled, virtually all of petitioner's submissions contain requests for a reduction of his sentence. Two such requests remain open.

The above civil action was initiated with a filing titled Addendum to Petitioner's Presently Pending Petition Under Writ of Coram Nobis. No such petition was then in fact pending. Petitioner filed a Motion Under Coram Nobis a month later. Petitioner subsequently asked for "dismissal" of that motion "based on the fact that such a motion is improper." The motion for a writ of coram nobis was denied, but apparently the pre-motion "addendum" was treated as a distinct pleading and the above civil action remained open.

Also filed was a pleading titled Motion in Support of Summary Judgment Regarding Petitioner's Pending Post Conviction Relief Petition. It appears that the pending petition to which petitioner referred was still another Motion Pursuant to Writ of Error Coram Nobis, docketed at the above case number. In any event, the clerk treated the latter petition as one pursuant to 28 U.S.C. § 2255 and docketed it at the above civil action number.

At least when viewed collectively, petitioner's pending pleadings at the above civil action number are appropriately treated as a § 2255 petition. Petitioner has asked that his petition be construed "any way that this court deems proper" if a writ of error coram nobis "is not the correct vehicle." A writ of coram nobis is in fact available only when a petitioner has served his sentence and is no longer in custody. See U.S. v. Stoneman, 879 F.2d 102, 105-06 (3d Cir. 1989).

Petitioner contends that he should have received a three, rather than two, level reduction for acceptance of responsibility and that the amount of crack cocaine attributed to him was 120.4 grams too much because of a mathematical error. Petitioner asserts that effective counsel "would have argued successfully for a three point downward departure based on petitioner's acceptance of responsibility" and would have identified the mathematical error which pushed the drug quantity

above 1.5 kilograms and thus the base offense level from 36 to 38. Petitioner has also filed a § 2255 petition at another civil action number presenting the same grounds for a reduction of sentence, which will be denied as moot upon resolution of the instant action.

The court calculated the attributable drug quantity from petitioner's own statements regarding what he earned for each bundle sold and his acknowledgment that he earned between $50 and $200 per day during the course of his participation in the conspiracy, depending on the number of shifts he worked. The court used the lowest figure of $50 to derive five bundles or 135 vials of .045 grams per day and multiplied by the 240 days the drug trafficking conspiracy was reportedly active. This resulted in 1,458 grams to which the court added 80.2 grams from a distinct sale by petitioner to a confidential informant. The total of 1,530 grams placed petitioner at base offense level 38. With the two level reduction for acceptance of responsibility, petitioner's total offense level was 36. He was sentenced at the bottom of the corresponding guideline range of 188 to 235 months of imprisonment.

The court's calculation was extremely conservative and generous. Using the average of the daily amounts petitioner admitted earning, for example, would have increased by two and a half times the bundles of crack cocaine attributable to him. The

court also did not attribute to petitioner drugs represented by proceeds he collected form other sellers in the organization to which a cooperating co-conspirator was still committed by his plea agreement to testify.

Petitioner does not challenge the court's method of calculating the attributable drug quantity. Rather, he contends that the total should have been 1,330.4 (plus the 80.2) grams and that the figure of 1,458 grams resulted from an "arithmetic error." There was in fact no mathematical error. The correct result of multiplying 6.075 grams by 240 days is 1,458 grams.

What petitioner is actually complaining about is the use of 240 days. He urges that 6.075 grams should have been multiplied by 219 days for a total of 1,330.4 grams.

It was uncontroverted that the drug distribution conspiracy at issue was launched by September 1, 1991. At the time of sentencing on December 22, 1992, the court misperceived that petitioner had ultimately been detained and his activities thus disrupted on April 28, 1992. The period from September 1, 1991 through April 27, 1992 is 240 days.

After retrieving various pertinent information, the court is satisfied that petitioner was arrested on and detained continuously after April 8, 1992 as he currently states. This does not mean, as petitioner suggests, that a multiplier of 219 days should have been used. The period of September 1, 1991

through April 7, 1992 is 220 days. Nevertheless, 6.075 grams multiplied by 220 days is 1,336.5 grams which when added to the 80.2 grams results in 1,416.7 grams, an amount which would place petitioner at base offense level 36.

The 6.075 gram figure is very conservative, and a recalculation ab initio could result in an amount well within base offense level 38. Nevertheless, it is most unlikely that at the time of sentencing the court would have used a different methodology had it understood that the period during which petitioner was selling crack cocaine ended twenty days earlier than contemplated. If the court had perceived the actual date of detention at the time, it presumably would have multiplied by 220 days. Thus, had the correct arrest date been used at the time, petitioner almost certainly would have been sentenced at level 34 to a term of less than 188 months of imprisonment. It fairly appears that the result of the proceeding would have been different. The question remains, however, whether counsel performed in a deficient and unreasonable manner under prevailing professional standards in failing to discern and articulate the actual date of detention. See Strickland v. Washington, 466 U.S. 668, 686-88 (1984).

The court does not wish to disparage counsel or single him out for criticism. Counsel performed ably in achieving some positive results for petitioner and all participants should have

been more acute in confirming the pertinent date. The fact remains that counsel was one of those participants and one with a unique responsibility to petitioner. He could and reasonably should have confirmed the pertinent date and raised the significance of it during the sentencing proceeding. In that one particular counsel's performance was deficient.

Without meaning in any way to diminish the seriousness of petitioner's criminal conduct, the court believes that a sentence at the bottom of the guideline range for level 34 is adequate to fulfill the penal, deterrent and rehabilitative functions of sentencing. The court will thus reduce petitioner's sentence to 151 months of incarceration.

Petitioner's claim regarding acceptance of responsibility, on the other hand, is untenable. Petitioner elected to plead guilty on the day trial was scheduled to commence, after three co-defendants had agreed to plead guilty and cooperate, and when the government was fully prepared to proceed with the trial. Petitioner executed a plea agreement which specified that he qualified only for a two offense level reduction pursuant to U.S.S.G. § 3E1.1, which he received. The allegedly qualifying conduct did not "occur particularly early in the case" and petitioner did not notify the authorities of his intention to plead guilty "at a sufficiently early point in the

process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently." See U.S.S.G. § 3E1.1, comment. (n.6).

Under the circumstances, counsel was not ineffective in declining to argue for a third point under § 3E1.1 The absence of any such argument also did not prejudice petitioner as the court could not have conscientiously concluded that he qualified for a third point for acceptance of responsibility. Moreover, a further reduction of the total offense level from 34 to 33 would not result in a different sentence. The reduced sentence is within the guideline range for offense levels 34 and 33. Given the extremely conservative calculation of drug quantity, and the approximately 23 months of good time reduction petitioner can earn, a sentence of 151 months is as low as the court can conscientiously go.

ACCORDINGLY, this day of August, 2000, consistent with the foregoing, **IT IS HEREBY ORDERED** that petitioner's submission herein and request for a reduction of sentence, docketed and construed as a petition pursuant to 28 U.S.C. § 2255, is **GRANTED,** an appropriate order will be entered at petitioner's criminal case number reducing his sentence and the above civil action is closed.

BY THE COURT:

JAY C. WALDMAN, J.